

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VICKI L. CLOSE)	
Claimant)	
)	
VS.)	
)	
UNIVERSAL UNDERWRITERS GROUP)	
Respondent)	Docket No. 1,026,229
)	
AND)	
)	
ZURICH INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier request review of the February 20, 2008 Award by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on June 3, 2008.

APPEARANCES

Dennis L. Horner of Kansas City, Kansas, appeared for the claimant. Wade A. Dorothy of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The parties were unable to agree on the nature and extent of Vicki Close's functional impairment due to her work-related slip and fall. The Administrative Law Judge (ALJ) awarded claimant compensation based upon a 12 percent whole person functional impairment.

The respondent requests review of the nature and extent of Close's functional impairment. Respondent argues that Dr. Simon's impairment rating included 5 percent for pain and 15 percent for headaches but the doctor was unable to identify the specific portion of the *AMA Guides*¹, that provided for those ratings. Consequently, respondent further argues Dr. Simon's rating is not supported by the *AMA Guides*, 4th Ed. and Dr. Carabetta's 5.5 percent impairment rating should be adopted.

Conversely, Close argues that Dr. Simon's rating was pursuant to the *AMA Guides* and Dr. Carabetta failed to rate her constant headaches. Close further argues the ALJ's Award should be affirmed.

The sole issue for Board determination is the nature and extent of Close's functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Vicki Close is currently employed as a statistical analyst for the respondent. She suffered a slip and fall injury on December 16, 2003, in respondent's parking lot. She was walking through the parking lot when she slipped on ice and fell. She hit the ground on her right forearm and right hip then rolled onto her back. She initially experienced pain and a knot on her right arm but later in the day also began having neck, shoulder and right hip pain. Upon respondent's recommendation, Close sought medical treatment that afternoon with her primary care physician, Dr. Ronald Graham, with Associates in Family Care. Claimant returned to full-duty work on December 22, or December 23, 2003.

Before the work-related accidental slip and fall Close had been involved in an automobile accident on December 9, 2002. She suffered injuries to her neck and right shoulder. At the time of her work-related slip and fall accident she was still receiving treatment for the injuries suffered in her automobile accident. Her ongoing complaints included neck and shoulder pain as well as headaches.

Close testified that after the work-related slip and fall her neck complaints worsened and she now has constant headaches. She further testified that her neck injuries are different following the work accident versus the automobile accident. Close indicated she has more numbness down her right arm and she now has some left arm pain. And she now has hip pain from the fall. Close testified:

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Q. Okay. Now, you were having or had had some discomfort in your neck or shoulders from the December 2002 accident. How would you describe the effect on you from the fall in December 2003 at Universal Underwriters? How could you explain that to Judge Foerschler?

A. All of my pain was just a lot worse and the -- the pain -- I obviously didn't have any pain in my hips or my low back before the slip and fall in the parking lot. I had that afterwards. And on my left side of my neck and my -- my arm, I, after the fall, had like an electrical-type pain maybe once or twice a month on the left side that I didn't have before and it's just -- my pain was just a whole lot worse. The headaches were worse and just constant.²

Dr. Steven Simon first examined and evaluated Close on February 19, 2003, at the request of neurosurgeon, Dr. Wesley Griffitt. Close's complaints were head and neck pain following a motor vehicle accident. Dr. Simon found some increased tone in her posterior cervical spine, tenderness along the occipital nerves consistent with an occipital neuralgia, and a small herniated nucleus pulposus at C5-6 as well as possible bursitis in the right shoulder. An EMG was performed and indicated normal findings with no nerve-related pathology. Close was seen monthly for conservative treatment.

Dr. Simon testified :

Q. Okay. Mrs. Close has testified that she has problems with her left arm now, which she did not have prior to the fall. Can you give us some insight as to why she would complain of problems on the left side now that she didn't have before?

A. Well, her MRI prefall in 2003 and her MRI postfall in 2004 show new pathology that did not exist and that new pathology does involve a new lesion of a left lateral disk producing spinal stenosis at C5/6 where she already had a small disk herniation to the right, but this was new to the left. Also, she had new pathology at C6/7, which was not evidenced on the earlier 2003 MRI.³

Based upon the *AMA Guides*, Dr. Simon rated Close's impairment of function as follows: (1) 5 percent for her cervical spine; (2) 5 percent for pain; and, (3) 15 percent for intractable headaches. All of these impairments result in a 23 percent impairment to the body as a whole when utilizing the combined values chart. Dr. Simon further opined that Close's preexisting functional impairment caused by the automobile accident would be from 5 to 8 percent.

At respondent's attorney's request, Dr. Vito J. Carabetta, board certified in physical medicine and rehabilitation, examined and evaluated Close on May 16, 2007. She

² R.H. Trans. at 11-12.

³ Simon Depo. at 8.

primarily complained of neck and hip pain. The doctor reviewed the MRI reports from January 17, 2003, and February 18, 2004. Dr. Carabetta testified there was no differences noted between the two MRIs. The doctor diagnosed Close as having some underlying cervical degenerative disk disease with spinal stenosis, regional fibromyositis and right trochanteric bursitis. Based on DRE Category II of the *AMA Guides*, Dr. Carabetta rated Close's neck impairment at 5 percent to the body as a whole. The doctor further determined that 2.5 percent was due to the automobile accident and the other 2.5 percent was for the work-related injury. But Dr. Carabetta explained this apportionment was based upon Close's comment that her symptoms before the work-related accident were only half as bad as her symptoms after the work-related accident. As to the hip impairment, the doctor determined Close had a 3 percent impairment due to trochanteric bursitis which was caused by the slip and fall incident. Using the Combined Values Chart, the 2.5 percent and 3 percent result in a 5.5 percent whole body impairment.

The sole issue is the extent of claimant's functional impairment. Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the *AMA Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.⁴ The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.⁵ It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.⁶

The record contains ratings from Drs. Simon and Carabetta. Both doctors based their ratings upon the *AMA Guides*. Although respondent argues that Dr. Simon could not identify where the *AMA Guides* provided for a rating for Close's headaches, a review of the doctor's testimony establishes that he identified the pages in the *AMA Guides* where headaches are discussed and that he further noted the neurology chapter of the *AMA Guides* that deals with sensory nerve pain provided percentages. And Dr. Carabetta agreed that headaches are ratable under the *AMA Guides*.

Dr. Simon rated Close's functional impairment at 23 percent to the whole person which included 5 percent for the cervical spine, 5 percent for pain and 15 percent for her constant headaches. Dr. Simon further opined that before the work-related accident claimant suffered a 5 to 8 percent whole person functional impairment. Deduction of the

⁴ K.S.A. 44-510e(a).

⁵ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

⁶ *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

preexisting functional impairment would result in an approximate 16.5 percent whole person functional impairment.

Dr. Carabetta did not provide a rating for Close's headaches or pain but did provide a 3 percent rating for Close's hip and a 5 percent rating for Close's cervical spine. Dr. Carabetta apportioned the 5 percent for the cervical spine but based his decision on Close's comments about her pain before and after the accident. Such apportionment is not pursuant to the *AMA Guides* and is not persuasive. Using the Combined Values Chart, Dr. Carabetta's 5 percent rating for the cervical spine and 3 percent rating for the hip result in an 8 percent whole person functional impairment.

As previously noted, both doctors recited that their ratings were based upon the *AMA Guides*. In this instance, the evidentiary record fails to persuade the Board that either rating is more credible. Consequently, the Board will accord equal weight to both opinions and finds claimant suffers a 12 percent whole person functional impairment as a result of the injuries suffered on December 16, 2003.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated February 20, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier

Robert H. Foerschler, Administrative Law Judge